





Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Agenda

1. Asylum, Withholding, and Convention Against Torture
2. Criminal Cases and Immigration Law
3. The Fourth Circuit's decision in *Nardea v. Sessions*,
876 F.3d 675 (4th Cir. 2017)

Asylum, Withholding of Removal, and Convention Against Torture in the Fourth Circuit



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

4th Circuit on Those Subject to a Reinstated Order of Removal

- *Mejia v. Sessions*, 866 F.3d 573 (4th Cir. 2017)
 - Congress was clear in intent that aliens subject to reinstated orders of removal are precluded from applying for asylum
 - Barring illegal re-entrants from applying for asylum does not conflict with United States' international treaty obligation



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

4th Circuit on Applicability of Changed Circumstances Exception

- *Lara-Aguilar v. Sessions*, No. 16-1836, ____ F.3d ____, 2018 WL 2026971 (4th Cir. 2018)
 - Affirmed *Mejia*. Changed circumstances exception does not apply to the reinstatement bar
- *Salgado-Sosa v. Sessions*, 882 F.3d 451 (4th Cir. 2018)
 - The Immigration Judge can consider “new facts that provide additional support for a pre-existing asylum claim.” See *Zambrano v. Sessions*, 878 F.3d 84 (4th Cir. 2017).



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

4th Circuit on Family PSGs

- 4 of the recent precedent AsyWHCAT cases issued in the last 16 months relate to family-based PSGs
- 4th Circuit has taken an expansive view of relevant considerations for determining whether harm is on account of a family PSG



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Cantillano Cruz v. Sessions, 853 F.3d 122 **(4th Cir. 2017)**

- Common law spouse is a nuclear family member
- Look to why the respondent, and not another person, was persecuted
- Statutory nexus standard requires consideration of “intertwined reasons” for persecution



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Zavaleta-Policiano v. Sessions, 873 F.3d 241 (4th Cir. 2017)

- Affirmed Cruz and need to consider “intertwined reasons” for harm and not only the articulated purpose of harm
- Mass effects of gangs on the general population is “beside the point” in addressing a particular respondent’s claim. Citing *Crespin-Valladares v. Holder*, 632 F.3d 117, 127 (4th Cir. 2011)).



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Velasquez v. Sessions, 866 F.3d 188 (4th Cir. 2017)

- Confirmed that intra-family personal disputes are not successful family-based PSG claims
- Family-based PSG claims should involve outside or non-familial actors engaged in persecution for non-personal reasons



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Salgado-Sosa v. Sessions, 882 F.3d 451 (4th Cir. 2018)

- The focus in determining if nexus is established must be on why the respondent was persecuted—not necessarily the “immediate trigger” for the family’s persecution and whether the family was persecuted on account of a protected ground.



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

4th Circuit Family PSG Takeaways

- Common law spouses/partners count as family
- Consider the “intertwined reasons” for a respondent’s persecution and not just the stated purpose of persecution
- Non-familial actors motivated by non-personal reasons distinguish a family-based PSG from an intra-family dispute
- Nexus focus is on why the respondent is being targeted, not on why his family is being targeted

Criminal Cases & Immigration Law in the 4th Circuit



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Criminal Cases in the 4th Circuit

- Crimes of violence under the elements/force clause of 18 U.S.C. § 924(e)(2)(B), the Armed Career Criminal Act
- Crimes of violence under the elements/force clause of the U.S. Sentencing Guidelines § 4B1.2(a)
- Both define COVs identically to 18 U.S.C. § 16(a)
- Two main issues: *mens rea* and what entails physical force



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Mens Rea of COVs

- *United States v. Townsend, 886 F.3d 441 (4th Cir. 2018)*
 - Look at the elements as defined by a state's highest court
 - Use of force requires a *mens rea* greater than negligence or recklessness



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Defining Physical Force

- *United States v. Salmons, 873 F.3d 446 (4th Cir. 2017)*
 - Committed by violent statutory means
 - West Virginia distinguishes between ordinary and aggravated robbery
 - Reiterated the realistic probability test



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Direct v. Indirect Force

- *In re Irby*, 858 F.3d 231 (4th Cir. 2017)
 - Rejected the distinction between direct and indirect force
 - Abrogated *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012) in light of *United States v. Castleman*, 134 S. Ct. 1405 (2014)



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Direct v. Indirect Force

- *United States v. Reid*, 861 F.3d 523 (4th Cir. 2017);
United States v. Burns-Johnson, 864 F.3d 313 (4th Cir. 2017); *United States v. Covington*, 880 F.3d 129 (4th Cir. 2018)
 - Affirmed *In re Irby*
 - Reiterated there were no distinctions between direct and indirect force in the Fourth Circuit



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Direct v. Indirect Force

- *United States v. Middleton, 883 F.3d 485 (4th Cir. 2018)*
 - Rejected the reasoning in *Castleman*, noting a distinction between *de minimis* force and violent force
 - *Torres-Miguel* not abrogated in regard to causation
 - Concurrence questions these distinctions



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

4th Circuit COV Takeaways

- A state's interpretation of a crime is controlling
- There must be a realistic probability conduct would be penalized under a statute
- The 4th Circuit no longer makes distinctions between direct and indirect force
- Parts of *Torres-Miguel* regarding causation have not been abrogated

Nardea v. Sessions, 876 F.3d 675 (4th Cir. 2017)



Fourth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Nardea v. Sessions, 876 F.3d 675 (4th Cir. 2017)

- The 4th Circuit found DHS' evidence was sufficient to establish the Petitioner entered the United States through the Visa Waiver Program
- It applied the presumption of regularity to establish the Petitioner was a waiver tourist
- The Fourth Circuit declined to address whether the knowing or voluntary standard applies to Visa Waiver entrants



Sixth Circuit Precedent

Malea R. Hetrick
Permanent Attorney Advisor, Cleveland Immigration Court



Sixth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Asylum, Withholding, Convention Against Torture

Criminal Cases *outside* of the Immigration Context

“Other” Cases- Motion to Reopen, Special Rule
Cancellation NACARA Application



Sixth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Issue: Whether a woman who will either be subject to an “honor killing,” or alternatively, “protective custody” in Jordan is entitled to asylum relief.

Kamar v. Sessions, 875 F.3d 811 (6th Cir. 2017)



Sixth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Arguments on Appeal to the Sixth Circuit:

- That the Board’s decision that the Jordanian government would be able and willing to protect her was not supported by substantial evidence
- That the Board’s decision erred as a matter of law in finding that the Jordanian government’s policy of involuntary incarceration does not violate the CAT

Kamar v. Sessions, 875 F.3d 811 (6th Cir. 2017)



Sixth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

United States v. Morris, 885 F.3d 405 (6th Cir. 2018)

United States v. Verwiebe, 874 F.3d 258 (6th Cir. 2017)

Perez v. United States, 885 F.3d 984 (6th Cir. 2018)

Criminal Cases- Crimes of Violence



Sixth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Michigan's felony assault statute, M.C.L. § 750.81

- Not divisible
- Not a crime of violence under the “elements” clause of the 2015 Guidelines
 - Elements Clause
 - Enumerated Offense Clause
 - Residual Clause

United States v. Morris, 885 F.3d 405 (6th Cir. 2018)



Sixth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Federal statutes

- Assault with a dangerous weapon with intent to do bodily harm- 18 U.S.C. § 113(a)(3)
- Assault resulting in serious bodily harm- 18 U.S.C. § 113(a)(6)
 - Includes reckless conduct

United States v. Verwiebe, 874 F.3d 258 (6th Cir. 2017)



Sixth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Second Degree Robbery under N.Y. Penal Law § 160.10

- Divisible, so modified categorical approach applied
- Violent felony under 18 U.S.C. § 924(e)(2)(B)(i) (ACCA)
 - Analogous to 18 U.S.C. § 16(a)

Perez v. United States, 885 F.3d 984 (6th Cir. 2018)



Sixth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Issue: Whether the Board abused its discretion in denying the Respondent's motion to reopen due to changed country conditions.

Trujillo Diaz v. Sessions, 880 F.3d 244 (6th Cir. 2018)



Sixth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

The Sixth Circuit found that the Board abused its discretion when it found that Trujillo Diaz:

- Failed to present prima facie evidence that she would be singled out individually for persecution on account of a protected ground
- Failed to present a prima facie showing of eligibility for WH of removal under the CAT

Trujillo Diaz v. Sessions, 880 F.3d 244 (6th Cir. 2018)



Sixth Circuit Precedent
2018 Executive Office for Immigration Review
Legal Training Program

Special Rule Cancellation with NACARA

- Lopez must show that he was not apprehended at the time of entry- that he was free from governmental detection or restraint
- Burden is on Lopez- but what all must he show?

Lopez v. Sessions, 851 F.3d 626 (6th Cir. 2017)



Eighth Circuit Precedent Roundup

Brendan Rush
Permanent Attorney Advisor, Hartford Immigration Court



**Rodriguez-Labato v. Sessions, 868 F.3d
690 (8th Cir. 2017)**

- Cancellation of removal for certain nonpermanent residents
- 10 years of physical presence break
- Previous voluntary departure
- No warnings - 8 C.F.R. 1240.25
- Issue:
 - Threat of Deportation

Eighth Circuit Precedent Round-Up
2018 Executive Office for Immigration Review
Legal Training Program



**Rodriguez-Labato v. Sessions, 868 F.3d
690 (8th Cir. 2017)**

- HOLDING:
 - YES
 - VD w/out warnings can be under threat of deportation.
- Why?
 - Threat of deportation was expressed and understood

Eighth Circuit Precedent Round-Up
2018 Executive Office for Immigration Review
Legal Training Program



**Rodriguez-Labato v. Sessions, 868 F.3d
690 (8th Cir. 2017)**

Case 2:14-cv-02819-NB-JCW Document 50-1 Filed 07/06/15 Page 1 of 1
U.S. Department of Homeland Security Notificación de Derechos y Solicitud de Resolución
Form 4-1
Número de caso: _____
Número de expediente: _____
NOTIFICACIÓN DE DERECHOS
Usted ha sido demandado por los oficinas de Inmigración opiniones que se encuentran en los Estados Unidos. Usted tiene el derecho de presentar una respuesta ante la Oficina de Inmigración y Ciudadanía o ante un Tribunal de Inmigración y Ciudadanía que se encuentra dentro de los Estados Unidos. Si el caso de que Usted solicita esa audiencia, puede hacerlo dentro o fuera del Tribunal de Inmigración y Ciudadanía hasta la fecha de la audiencia. Tiene la opción de solicitar el registro a su caso en el Tribunal de Inmigración y Ciudadanía.
Usted tiene derecho a comunicarse con su abogado y otro representante legal para que lo represente en su audiencia, o a participar en cualquier reunión acerca de sus derechos conforme a la ley en los Estados Unidos. Si Usted se lo pide, una funcionaria que lleva a cabo esta Notificación le dará una lista de los abogados y otros representantes legales que están registrados en su caso y que tienen la autorización de la Oficina de Inmigración y Ciudadanía a presentar argumentos acerca de su situación o dignidad de su caso. Puede usar su teléfono para llamar a su abogado, o a otro representante legal, si es un funcionario conocido de cualquier otra manera a su oficina de los Estados Unidos.

SOLICITUD DE RESOLUCIÓN
 Solicitar una audiencia ante el Tribunal de Inmigración que resuelve su problema o su permanecer en los Estados Unidos.
 Considerar que necesita no peligrar ni expor su país. Mi caso se tratará en el Tribunal de Inmigración para la celebración de mi audiencia.
 Admitir que estoy desplazado en los Estados Unidos, y, no considero que exista ni peligro ni expreso la intención de regresar a mi país. Remover a mi derecho a mis servicios de inmigración para su audiencia. Deben considerar mi caso para su audiencia en el Tribunal de Inmigración para su audiencia. Deben considerar mi caso para su audiencia en el Tribunal de Inmigración para su audiencia.

Firma del oficina _____ Fecha _____
CERTIFICATION OF SERVICE
 Notice was read by subject _____
 Notice was read to subject by _____ in the _____ language

Name of Immigration Officer (Print) _____ Name of Immigration Officer (Print) _____
 Signature of Officer _____ Date and Time of Service _____
 Form I-485-005-015

**Eighth Circuit Precedent Round-Up
2018 Executive Office for Immigration Review
Legal Training Program**



**Rodriguez-Labato v. Sessions, 868 F.3d 690
(8th Cir. 2017)**

- This situation included:
 - Signed Form I-826 (alone would have been enough)
 - Detained Alien (photographed/fingerprinted)
 - Shows “formal documented process”
 - Without more may not demonstrate threat of deportation

**Eighth Circuit Precedent Round-Up
2018 Executive Office for Immigration Review
Legal Training Program**



**Mayorga-Rosa v. Sessions, 888 F.3d 379
(8th Cir. 2018)**

- Asylum/Particular Social Group
- Alien failed to propose a PSG
- IJ inferred the PSG
- **HOLDING:**
 - IJ was not required to seek clarification of PSG because Alien did not meet his burden to propose a PSG.

Eighth Circuit Precedent Round-Up
2018 Executive Office for Immigration Review
Legal Training Program



Lopez v. Sessions, 886 F.3d 721 (8th Cir. 2018)

- Asylum
- No Past Persecution – extreme concept
 - Minor beatings, unfulfilled threats, low level intimidation
 - No Medical care, no lasting injuries

Eighth Circuit Precedent Round-Up
2018 Executive Office for Immigration Review
Legal Training Program



Lopez v. Sessions, 886 F.3d 721 (8th Cir. 2018)

- **Asylum**
- **No Well Founded Fear of Future Persecution**
 - Separated from husband
 - Abusive texts ceased after phone number changed
 - Husband complied with judge's order

Eighth Circuit Precedent Round-Up
 2018 Executive Office for Immigration Review
 Legal Training Program



Balitti v. Sessions, 878 F.3d 240 (8th Cir. 2017), vacating and superseding Balitti v. Sessions, 862 F.3d 718 (8th Cir. 2017).

- **Asylum: Nexus**
 - Alien was imprisoned prior to expressing his political opinion = no nexus
 - No nexus = denial

Eighth Circuit Precedent Round-Up
 2018 Executive Office for Immigration Review
 Legal Training Program



Balitti v. Sessions, 878 F.3d 240 (8th Cir. 2017), vacating and superseding Balitti v. Sessions, 862 F.3d 718 (8th Cir. 2017).

- **Asylum: Well Founded Fear**
- **Fear not objectively reasonable**
 - Lived unharmed for 10 months
 - Dated events
 - Similarly situated

Eighth Circuit Precedent Round-Up
 2018 Executive Office for Immigration Review
 Legal Training Program



U.S. v. Naylor, 887 F.3d 397 (8th Cir. 2018)

- **Criminal – Categorical Approach**
- **Issue: “building or inhabitable structure” in Missouri 2nd degree burglary statute - means or elements?**

Eighth Circuit Precedent Round-Up
 2018 Executive Office for Immigration Review
 Legal Training Program



U.S. v. Naylor, 887 F.3d 397 (8th Cir. 2018)

- **Criminal – Categorical Approach**
 - 1) Look at the statute
 - 2) Case law
 - 3) Jury Instructions
 - If no “clear answer” from case law then “peak” at the record docs

Eighth Circuit Precedent Round-Up
 2018 Executive Office for Immigration Review
 Legal Training Program



Onduso v. Sessions, 877 F.3d 1073 (8th Cir. 2017) & Ramirez-Barajas v. Sessions, 877 F.3d 808 (8th Cir. 2017).

- MN misdemeanor domestic assault categorically qualifies as a crime of violence under 18 U.S.C. § 16(a)
- Under 8th Cir. precedent – making another fear imminent bodily harm requires the use of force

Eighth Circuit Precedent Round-Up
 2018 Executive Office for Immigration Review
 Legal Training Program



**Dominguez-Herrera v. Sessions, 850 F.3d
411 (8th Cir. 2017)**

- KS municipal judgments = criminal convictions
- Considerations:
 - States interpretation
 - Standard of proof
- CIMT
 - Intent to permanently deprive
 - 1 year

Eighth Circuit Precedent Round-Up
2018 Executive Office for Immigration Review
Legal Training Program



**Fourth, Sixth, and Eighth Circuit
Precedent Roundup**